STATE OF MICHIGAN

COURT OF APPEALS

WALTER WALTON,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 7, 2006

No. 257519
Wayne Circuit Court
LC No. 03-330042-NO

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted summary disposition to defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a resident in a building owned by defendant. Defendant acquired title to the building as a result of a tax forfeiture by the previous owner. A fire occurred and plaintiff was injured. According to his deposition, plaintiff paid rent to a man at an office in the building.[1] Plaintiff had no contact with any representatives of defendant. The building was locked, and the residents and visitors had to be admitted either electronically or by office staff.

Plaintiff filed this suit against defendant, asserting that the proprietary function exception to governmental immunity applied, and that defendant was liable for his injuries caused during the fire. The trial court granted defendant's motion for summary disposition on the ground that defendant was not engaged in a proprietary function by merely owning the building. The trial court also denied plaintiff's motion to amend his complaint to assert the public-building exception to governmental immunity. The court found that the building was not open to the general public and, therefore, the amendment would be futile.

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[1]This Court granted defendant's motion to supplement the record and allow pages 36-38 of plaintiff's deposition testimony.

This Court reviews de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). A motion under this subsection of the court rule "tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). The pleadings and documentary evidence must be construed in the light most favorable to the nonmoving party. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004).

To succeed in his claim of negligence, plaintiff must prove that defendant owed a duty to him, that defendant breached that duty, that he suffered an injury, and that the injury was caused by defendant's negligence. *Haliw v Sterling Hgts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Where, as here, the defendant is a governmental agency, plaintiff must also allege facts showing that his case fits within an exception to governmental immunity. *Id.* at 302-304.

The governmental immunity act, MCL 691.1401 *et seq*., provides immunity to a government defendant when it is engaged in a governmental function. The immunity conferred on governmental agencies is broad, and the exceptions are narrowly drawn. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 149; 615 NW2d 702 (2000) (relying on *Ross v Consumers Power Co [On Rehearing]*, 420 Mich 567, 618; 363 NW2d 641 [1984]). MCL 691.1413 sets forth the "proprietary function exception," which defendant alleged in his complaint. That statute provides:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except injury or loss suffered on or after July 1, 1965.

The issue to be decided here is whether ownership of the building was an activity that was conducted for the purpose of producing a pecuniary profit for defendant. *Russell v Dep't of Corrections*, 234 Mich App 135, 138; 592 NW2d 125 (1999). Additionally, the activity conducted cannot be one that is normally supported by taxes and fees. *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

In the instant case, while defendant owned the property, it did not conduct any activity for pecuniary profit or otherwise. The only evidence presented was from plaintiff's deposition where he testified that he did not have any contact with any representative of defendant. Plaintiff did not submit any evidentiary material to establish the existence of any profit to defendant so as to create a genuine issue of material fact. Even if defendant realized some profit, there was no evidence submitted by plaintiff showing that it was used to pay for unrelated government projects or to generally reduce taxes. *Coleman, supra* at 622. Construing the documentary evidence in a light most favorable to plaintiff, we hold that plaintiff presented insufficient evidence to establish that defendant was engaged in a proprietary function.

This Court reviews the trial court's decision to deny plaintiff's motion to amend his complaint for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). If an amendment would be futile, it is not an abuse of discretion to deny a motion to amend. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

MCL 691.1406, which governs the public-building exception to governmental immunity, provides in pertinent part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

To fall within this exception, plaintiff must prove that the building in question was open for use by members of the public. *Kerbersky v Northern Michigan Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998). "[M]ere public ownership of a building is insufficient to meet the requirements of the public-building exception." *Maskery*, *supra* at 617. If public ownership was sufficient by itself to impose liability then the statutory language of "when open for use by members of the public" would be rendered nugatory. *Id.*

"To determine whether a building is open for use by members of the public, the nature of the building and its use must be evaluated." *Id.* at 618. The *Maskery* Court held that the student housing unit involved in that case was not a public building within the meaning of the statute. The building remained locked and required the use of a courtesy phone to contact a resident in order to have the door unlocked and to allow entry. *Id.* at 620. In the instant case, a similar system was in place. No one entered the building without being electronically or physically admitted by the office staff. The building was, therefore, not open to the general public.

The trial court correctly found that the amendment would have been futile because the facts, even as pleaded, did not avoid governmental immunity. The court did not abuse its discretion in denying plaintiff's motion to amend his complaint.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey

I concur in result only.

/s/ Jessica R. Cooper